IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 675

JOHN T. DEMPSEY, as Administrator of the Estate of Gabriel de Fontarce, Deceased,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

LOUIS E. PENNISH,
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JOHN T. DEMPSEY, as Administrator of the Estate of Gabriel de Fontarce, Deceased,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your petitioner, John T. Dempsey, as Administrator of the Estate of Gabriel de Fontarce, deceased, praying for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit

affirming a judgment dismissing petitioner's Amended Complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, respectfully submits:

John T. Dempsey, petitioner, was appointed (upon the petition of a creditor) by the Probate Court of Cook County, Illinois, administrator of the Estate of Gabriel de Fontarce, a free Frenchman who died in London, England in June of 1941 and who, at the time of his death, was domiciled either in Great Britain, Egypt, Eire or France (R. 4-5, 141). In his sworn Amended Complaint petitioner showed that respondent, a New York corporation *authorized to do and doing business in Illinois,* held physical possession, as mere custodian or depositary, of certain securities called "kaffirs" of a value of $120,000 belonging to the decedent (R. 3-5). Petitioner sought recovery of these securities so that they might be administered *in Illinois* (R. 11).

Decedent had never been resident or domiciled in the United States and his estate was being administered in England and Brazil, and possibly in Ireland, France and Monaco (R. 4-5). Petitioner showed that *decedent left no debts in any state of the United States except in Illinois* and that decedent's estate in Illinois would be *insolvent* unless respondent delivered said assets to petitioner (R. 5).

Petitioner showed that although decedent's niece had attempted to start ancillary administration in New York, her petition had never been granted and no administration had ever been commenced by appointment of a representative of said estate in New York; that no jurisdiction

in rem or *in personam* had ever been obtained by the New York court; and that decedent's niece had no objection to the administration of said assets by petitioner in the Probate Court of Cook County (R. 10).

Petitioner further showed that ancillary administration in New York would be utterly useless and wasteful of the assets concerned; that no inheritance, succession or other taxes were due to the State of New York on account of said assets; that the Surrogate's Court of New York had no power or authority to make any final distribution of said assets to decedent's ultimate heirs or distributees; and that New York administration would be particularly wasteful by reason of the court costs, administrator's fees and attorneys' fees of such administration (R. 6-9).

Petitioner further offered to obtain a waiver of any New York succession or other taxes on said assets or to pay any taxes found to be due and unpaid (R. 8). Petitioner showed that respondent claimed $10.43 as custodian fees, but denied that any such sum was due (R. 9-10). Petitioner showed, on the contrary, that respondent was substantially overpaid for its custodian services on decedent's death; but petitioner offered to pay any custodian fees found to be due or to constitute a lien or charge on said assets (R. 9-10).

Petitioner alleged that he was without knowledge as to the physical location of the certificates evidencing the securities sued for, but that (except for possible reference thereto) there were no assets or securities belonging to decedent in New York upon which any administration proceedings could be based (R. 10).

Respondent filed a motion to dismiss the verified Amended Complaint supported by affidavits (R. 23). The trial court held that the proceeding pending in the Probate Court of Cook County, Illinois is an ancillary one and therefore limited to the administration of assets physically found within the jurisdiction of that Court; and that although the respondent does business in Illinois and was served there, so that the District Court had full jurisdiction over respondent, nevertheless such jurisdiction did not constitute "jurisdiction over any of decedent's property which at the time of his death was located in New York or anywhere else outside of Illinois" (R. 112). The District Court further found, in spite of the sworn allegations in the Amended Complaint directly to the contrary, that the New York Surrogate's Court had "first acquired and still retains jurisdiction over any assets belonging to Gabriel de Fontarce which at the time of his death were located in the State of New York," and that "until the matter there pending is disposed of, this Court will not interfere and attempt to exercise any jurisdiction over assets now in the control of the Surrogate Court of New York, even if it had authority, which it does not believe it has, to direct that such assets be turned over to the Illinois Administrator" (R. 113). The District Judge thereupon dismissed the Amended Complaint (R. 113).

From this order dismissing the Complaint, petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit; and that Court on November 12, 1943 affirmed the judgment below upon the ground that petitioner by his grant of ancillary letters of administration "obtained only a special and limited authority to act in collecting and disposing of such personal property as the decedent left within the confines of the State of Illinois," citing

11 R. C. L. on Executors and Administrators, Sec. 529; and Woerner, American Law of Administration, 3rd Ed. Vol I, Sec. 157 (R. 147). The Circuit Court based its decision also upon the finding that the New York Surrogate's Court "had assumed jurisdiction upon the filing of the petition" and that "it was its duty to retain that jurisdiction for the purpose of administering the assets within the state or transmitting them to the domiciliary executor or administrator when his identity was ascertained" (R. 148).

Although the Circuit Court's opinion does not so state, this conclusion is likewise squarely in conflict with the sworn allegations regarding the actions and jurisdiction of the New York Surrogate's Court contained in the sworn Amended Complaint (R. 8-10).

This petition seeks to review this judgment of the Circuit Court of Appeals.

Statement of Basis of This Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case directly conflicts, upon a question of Federal law, with all of the decisions of this Court and all of the other Circuit Courts of Appeals.

The Questions Presented.

There is one question presented:

Should a useless and expensive ancillary administration be permitted in one state (New York) when the Federal court of another state (Illinois), where ancillary administration is necessary and has been commenced, has sufficient jurisdiction over a corporation holding assets

belonging to the same decedent to compel such corporation by an *in personam* decree to deliver such assets, or to pay the value thereof in money, to the administrator in the latter jurisdiction? In other words, was there a cause of action stated in petitioner's sworn Amended Complaint?

Reasons for the Allowance of the Writ.

As shown below in our Argument, it amply appears that the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is *directly in conflict upon a question of Federal law* with the decisions of this Court in *New England Life Insurance Co.* v. *Woodward*, 111 U. S. 138, and *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, and with the decisions of the inferior Federal courts upon the same question.

The question involved is important. It involves a determination of the authority of the Federal courts to grant full *in personam* relief against a corporation properly sued within the jurisdiction of the Federal court, especially where the exercise of this jurisdiction will prevent a useless and expensive ancillary administration in another state. This is the principle enunciated by this Court in *New England Life Insurance Co.* v. *Woodward*, 111 U. S. 138 and *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308 above referred to.

Wherefore, petitioner prays that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the Record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end

that this cause may be reviewed and determined by this Honorable Court as provided by the laws and Statutes of the United States; that said final order of said Circuit Court of Appeals be reviewed or altered by this Honorable Court; and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

JOHN T. DEMPSEY, as Administrator of the Estate of Gabriel de Fontarce, deceased,

Petitioner.

By LEWIS E. PENNISH,
Counsel for Petitioner.

NORMAN CRAWFORD,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The United States Circuit Court of Appeals for the Seventh Circuit rendered its opinion in this case on November 12, 1943. The opinion is set forth on pages 141-8 of the Record and is reported in 138 F. (2d) 663.

Jurisdiction

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Seventh Circuit on November 12, 1943. A writ of certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and questions presented, see this petition (pp. 1 to 5).

Specification of Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the order dismissing petitioner's sworn Amended Complaint.

2. The Circuit Court of Appeals for the Seventh Circuit erred in not holding that petitioner's sworn Amended Complaint stated a valid cause of action.

ARGUMENT.

It is submitted that petitioner's sworn Amended Complaint states a valid cause of action and that it is beyond doubt and dispute that petitioner, as ancillary administrator in Illinois, may recover and administer any assets belonging to the decedent which are recoverable by a direct *in personam* proceeding in the Federal Court in Illinois in which the respondent corporation is properly sued and served.

This Court has held in *New England Life Insurance Co.* v. *Woodward,* 111 U. S. 138, and *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, that a suit may be brought by a decedent's administrator to recover money belonging to the decedent against a non-resident debtor temporarily within the state, or a corporation doing business there, regardless of where such corporation may have been incorporated or where its principal office may be.

In the *New England* case an ancillary administration was commenced in Illinois without any tangible assets whatever, the sole property consisting of a claim upon an insurance policy issued by the New England Mutual Life Insurance Company, which was a foreign corporation authorized to do business in Illinois. In an opinion which has been cited many times, this Court held that the claim against the Insurance Company was sufficient upon which to found the Illinois ancillary administration, without any other physical assets in Illinois, and that the action to recover money upon the policy could be maintained in the Federal District Court in Illinois, even though the

Insurance Company (like the respondent in this case) was a foreign corporation doing business in Illinois. This Court said (p. 145):

> "The general rule is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this Court has recently affirmed in *Wyman* v. *Halstead*, 109 U. S. 654. But the reason why the State which charters a corporation is its domicil in reference to debts which it owes, is because there only can it be sued or found for the service of process. This is now changed in cases like the present; and *in the courts of the United States it is held, that a corporation of one State doing business in another, is suable in the courts of the United States established in the latter State, if the laws of that State so provide, and in the manner provided by those laws.* *Lafayette Insurance Company* v. *French*, 18 How. 404; *Railroad Company* v. *Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad Company* v. *Koontz*, 104 U. S. 5, 10." (Italics added.)
>
> * * *
>
> "There is nothing in the foregoing views which is in conflict with what was decided in *Wyman* v. *Halstead, ubi supra.* In consonance with what was said in that case, payment of this debt to the administrator appointed in Illinois will be good against any administrator appointed elsewhere; and the defendant will be protected in paying this judgment, * * *"

It will be particularly noted that in the *New England* case the defendant was incorporated in a foreign state (Massachusetts), but was authorized to do business and was therefore held to be subject to the Federal court's jurisdiction in the state (Illinois) where suit was brought, exactly like respondent in the case at bar.

The *New England* case was followed, in *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, as settled American Law. There the defendant company was qualified to do business in Hawaii; but the defendant contended that since it was incorporated in the State of New York, only that state had jurisdiction over it, even though it was properly sued and served in the Federal court in Hawaii. This Court said (p. 312):

> "In substance, the contention of the plaintiff in error (defendant Insurance Company) is that on the facts above cited the *situs* of the indebtedness upon the policy in question was an asset solely within the jurisdiction of the State of New York and of its courts, and that the defendant had not its *situs* in the territory of Hawaii, the domicil of the deceased, where the policy was delivered and where it was actually present. *But this contention, in effect, has been decided by this Court to be unsound. New England Life Insurance Co.* v. *Woodward*, 111 U. S. 138." (Italics added.)

The lower Federal courts have uniformly cited and followed the ruling in the *New England* case, including the United States Circuit Court of Appeals of the Ninth Circuit:

> *Smith* v. *New York Life Insurance Co.*, 57 F. 133; 67 F. 694;
>
> *London, Paris & American Bank* v. *Aronstein*, 117 F. 601.

In the *Smith* case, letters of ancillary administration were granted in California; and the administration brought suit against the Insurance Company, which was a foreign corporation (New York) doing business in California. In the meantime a domiciliary administrator had been appointed in Illinois, and had there brought suit against the

defendant. It was held by the Circuit Court for the Northern District of California and affirmed by the Circuit Court of Appeals for the Ninth Circuit that the pendency of the Illinois suit was no bar to the California action, since the Federal Court in California had complete jurisdiction of the defendant New York corporation in California. The Federal Court specifically stated that it was *the duty of the ancillary administrator* in California, when there is a deficiency of assets, to sue and recover all goods, chattels, rights or credits *recoverable in the state of his appointment.*

In the *London, Paris & American Bank* case a California executor was held to be entitled to maintain an action in California against a British corporation for the transfer of assets consisting of stock belonging to decedent. This was on the theory that the California law required foreign corporations doing business there to maintain transfer agents in that state. The Ninth Circuit Court of Appeals in both these cases cited and relied on *New England Life Insurance Co.* v. *Woodward.*

This has likewise been the universal rule in the several states.

Fox v. *Carr*, 16 Hun. (N. Y.) 434;
Equitable Life Assurance v. *Voegl*, 76 Ala. 441;
Saunders v. *Weston*, 74 Me. 85;
Williams v. *Williams*, 79 N. C. 417.

We have no doubt that respondent will attempt to distinguish the case of *New England Mutual Life Insurance Co.* v. *Woodward*, 111 U. S. 138, and all of the numerous other cases above cited holding that the defendant may be sued by an Illinois administrator in an Illinois Federal

Court to recover money due the decedent, upon the ground that in the *New England* case intangible property (money) was involved, whereas in the case at bar tangible property is involved.

That this distinction is without any merit whatever is shown by the cases enunciating the well-known principle that in an action *in personam* a defendant may be required (1) to pay any money or (2) take any action regarding either *real* property or *tangible or intangible personal* property, even though the carrying out of such an action would involve doing an act and affecting a thing in a foreign state.

This general rule is stated in Restatement of the Law, "Conflict of Laws," Section 97, p. 147 under the title "Jurisdiction of Courts," where it said:

> "A state can exercise through its courts jurisdiction to order or to forbid the doing of an act within the state, *although to carry out the decree may involve doing the act or effecting a thing in another state.*" (Italics added.)

Or as it has otherwise been expressed:

> "If the thing required to be done is that which the defendant can do in this state, and there is the obligation of law upon on him to do it, the cases leave no doubt that this Court, acting on the person and not *in rem,* is not only competent but bound to make him him fulfill his obligation."

It has accordingly been frequently held in Illinois that an Illinois court may, by a decree *in personam,* enforce even a conveyance to plaintiff of real property situated in another state, provided only that the defendant is properly sued and served in Illinois.

Carter v. *Carter*, 283 Ill. 324;
Poole v. *Koons*, 252 Ill. 49;
Beavens v. *Murray*, 251 Ill. 603;
White Star Mining Co. v. *Hultberg*, 220 Ill. 578;
Sercomb v. *Catlin*, 128 Ill. 556.

These cases might be multiplied from all the other American jurisdictions; and the rule is the same in the Federal courts.

Clark v. *Iowa Fruit Co.*, 185 F. 604;
Byrne v. *Jones*, 159 F. 321.

Surely at this late date it cannot be seriously questioned that the Federal courts have power to require a defendant, properly sued and served within its jurisdiction, to turn over to an owner personal property owned by plaintiff, or to pay its value in money, in an action in *detinue*, wherever that property may be. *Hibbs* v. *Dunham*, 6 N. W. 719.

This right of a plaintiff to sue in a Federal court to recover his personal property, which is in the physical possession of defendant in another state, or its value, regardless of whether defendant may be exercising his physical dominion or possession of the property in such other state, and to require defendant to turn it or its value over to the true owner, was admitted by respondent in its brief in the trial court in this case. The precise language used by respondent in its brief to this effect was as follows:

> "It is perfectly true that had he (decedent), in his lifetime, *brought an action of detinue in the courts of Illinois*, Guaranty Trust Company would have had to surrender the property. This is so because he in his lifetime was the lawful owner, with complete title to these securities." (Italics added.)

A detinue suit is a proceeding *in personam* and not a proceeding *in rem;* and in the case at bar one of the prayers

for relief is for a decree requiring defendant "to pay to the plaintiff *the fair market value* of said securities, together with *damages* for their detention and together with the costs of this proceeding, and that judgment and execution issue thereon" (R. 11).

Since this civil action as in detinue is for money as well as property if the property is damaged or withheld, petitioner's claim *for money* is exactly the same as the administrator's claim *for money* in the *New England* and other cases in this Court. Respondent argued in the courts below that petitioner's claim was an action *in rem* rather than an action *in personam*. An action in detinue or in trover is not, as respondent contends, a proceeding *in rem*. It is an action or proceeding *in personam* which can be brought against any person withholding money or personal property, tangible or intangible, by or for the benefit of the true owner; and the defendant, when sued in such an action, cannot defend on the ground that it is exercising its physical possession of the property sued for, or which it has converted or is withholding, outside of the Federal court's jurisdiction.

The Circuit Court of Appeals appears to have fallen into the error of holding that the Federal Court in this case has insufficient jurisdiction *in personam* over the respondent to compel it (1) to turn over the physical personal property in its possession and control, or (2) to pay the money value thereof by judgment and execution, merely because petitioner holds ancillary letters of administration which confer only "a special and limited authority to act in collecting and disposing of such personal property as the decedent left within the confines of the State of Illinois." This flies squarely in the face of the decision of this Court in *New England Mutual Life Insurance*

Co. v. *Woodward*, 111 U. S. 138. For in that case the plaintiff was an *ancillary administrator*, and this Court found no difficulty in sustaining the jurisdiction of the Federal Court in Illinois to render a complete *in personam* decree against the Massachusetts corporate defendant, even though the defendant was an ancillary and not a domiciliary administrator. An ancillary administration was also involved in the case of *Smith* v. *New York Life Insurance Co.*, 57 F. 133; 67 F. 694 above cited.

Another argument which the respondent has made below (but which was not sustained in the Circuit Court of Appeals) is that the respondent in this case would not be protected from double liability in New York or elsewhere if the Illinois Federal Court in this case entered an *in personam* decree against the respondent.

But it has always been the law that where a defendant holding a decedent's assets is ordered by a court, having *in personam* jurisdiction of the defendant, to turn them over to either a domiciliary or ancillary administrator, compliance with that order is a bar to any other liability or claim upon the same assets.

Northwestern Mutual Life Ins. Co. v. *Johnson*, 275 Fed. 757;
L. & N. Ry. Co. v. *Jones*, 286 S. W. 1071;
Maas v. *German Savings Bank*, 176 N. Y. 377; 68 N. E. 658;
Rice v. *Metropolitan Life Ins. Co.*, 238 S. W. 772;
Talmage v. *Chapel*, 16 Mass. 69;
Chicago, etc. Ry. Co. v. *Schendel*, 270 U. S. 611;
Lewis v. *Adams*, 70 Cal. 403; 11 Pac. 833;
Hare v. *O'Brien*, 82 Atl. 475;
Hutchins v. *State Bank*, 12 Met. 421;
Fidelity Trust Co. v. *Williams*, 105 S. W. 952;
Valentine v. *Duke*, 222 Pac. 494;

Citizens National Bank v. *Sharp*, 53 Md. 521;
Compton's Administrator v. *Borderland Coal Co.*,
201 S. W. 20.

These cases hold that where an administrator, whether ancillary or domiciliary, sues to recover assets or their value in money in a state or Federal Court within the territorial jurisdiction of his appointment, and a judgment in such suit is entered in favor of the administrator so suing, the defendant is absolutely protected against any second suit which may be brought against the same defendant to recover the same assets or money in any other court any where.

Some of the foregoing cases, as we have said, involved ancillary administration and others involved domiciliary administration, the rule being similar in both cases. Moreover some of these cases related to the recovery of a money judgment, while others operated to the recovery of tangible or intangible property; and the rule was held equally applicable to both. Many of these cases even go so far as to hold that a *voluntary payment* to a domiciliary administrator, without any suit of any kind against the debtor, is adequate protection against double liability when asserted by an ancillary administrator elsewhere. It follows that a decree of court, if rendered in the Illinois Federal Court in this case, would be *a fortiorari* complete protection to respondent in paying the money or transferring the assets to petitioner which are sued for in this case.

There only remains to dispose of the argument that only in New York may these "kaffirs," or their value, be properly administered upon. This was not only the contention of respondent in the courts below, but was also a ground for the opinion in the Circuit Court of Appeals.

In the first place, petitioner points out that this sworn amended complaint specifically states (1) that no administration was ever commenced and no jurisdiction *in rem* or *in personam* was ever obtained by the New York Surrogate's Court; and (2) that ancillary administration in New York would under New York law be utterly useless and wasteful of the assets concerned and would be beyond the power or authority of the Surrogate's Court of New York, because the Surrogate's Court of New York has no power or authority to make any final distribution of the assets to decedent's ultimate heirs or distributees (R. 7-10).

In the second place, it has always been the law that *no ancillary administration is proper* in the absence of New York creditors; and petitioner's sworn Complaint squarely states that not only were there no New York creditors to justify the New York ancillary administration, but that there were no inheritance, succession or other taxes due in New York upon these assets (R. 7-9).

In Re Washburn's Estate, 47 N. W. 790 (Minn.);
Caruso v. *Caruso* (N. J.), 148 Atl. 882;
In Re Eaton's Will (Wis.), 202 N. W. 309;
Martin v. *Central Trust Co.,* 327 Ill. 622;
In Re Meyer's Estate, 211 N. Y. Supp. 525; affirmed 244 N. Y. 598.

It has moreover been held by both the State and Federal Courts in New York that an ancillary administrator in New York has no power to distribute the decedent's assets to his heirs or distributees unless all of the heirs or distributees reside in New York; and it is affirmatively alleged in petitioner's sworn Amended Complaint that the decedent's heirs and distributees are not all residents of New York (R. 4-5, 809).

Matter of Hughes, 95 N. Y. 55;
Lecouturier v. *Ickelheimer,* 205 Fed. 682.

It follows from these facts and from the foregoing authorities that an *ancillary* administration of this decedent's estate in New York would be utterly useless and improper, and as alleged in plaintiff's sworn Complaint, would be extremely expensive (R. 6, 9). The highest court of New York has decided in the case of *In Re Martin's Will,* 255 N. Y. 359; 174 N. W. 753, in a far-reaching decision by Judge Cardozo, that the costs and expenses of a useless *ancillary* administration are ample ground for refusal to permit such an administration. In his opinion in that case Judge Cardozo clearly held that there is no "absolute (exclusive) right" of administration; that "the unnecessary expenses of a double administration" which would necessitate "a wasteful duplication of administrations and accountings" was the very reason why administration "should be refused in the exercise of a sound discretion."

The New York courts have repeatedly held that it is only (1) where all of the next of kin reside in New York, and (2) when the rule of distribution of New York is identical with the rule of distribution in the domiciliary jurisdiction, that distribution will be permitted in New York.

Matter of Hughes, 95 N. Y. 55;
In Re Meyer's Estate, 211 N. Y. S. 525;
Matter of Worch's Estate, 208 N. Y. S. 652.

The latter two cases also hold, in conformity with Judge Cardozo's ruling in *In Re Martin's Will,* 255 N. Y. 359, that the New York court will wherever possible "*avoid the expense of double administration.*"

It was held in the trial court and in the Circuit Court of Appeals in this case that the Surrogate's Court of New York "first acquired and still retains jurisdiction over any assets belonging to Gabriel de Fontarce which at the time

of his death were located in the State of New York" (R. 113), because "that Court had assumed jurisdiction upon the filing of the petition", and that "it was its duty to retain that jurisdiction for the purpose of administering the assets within the state or transmitting them to the domiciliary executor or administrator when his identity was ascertained" (R. 148). Petitioner replies, first, that it is alleged in petitioner's sworn Amended Complaint that *no administration proceedings are pending in New York* "because no appointment of an administrator and no other action has ever been taken in said proceedings" and, second, that "said Surrogate Court of New York has not acquired any jurisdiction *in personam* over any representative of said estate or any jurisdiction *in rem* over any assets or securities or other properties of Gabriel de Fontarce whatsoever" (R. 10).

Moreover petitioner shows that Section 45 of the Surrogate's Court Act specifically states that the Surrogate's Court acquires exclusive jurisdiction over an estate only when "*letters testamentary or of administration have been duly issued*", and *not* by virtue of the mere *filing* of an *application for* administration *under which no appointment or other action has been had* (R. 10, 112, 143). Such cases as *Matter of Feinberg*, 280 N. Y. S. 540 hold that it is not merely the *filing of the petition*, but the *exercise of jurisdiction* through appointment of the administrator and the taking of the assets into *custodia legis* by him, *neither of which occurred in this case*, which gives the Surrogate exclusive jurisdiction.

It follows that the opinions of both the courts below in this case are erroneous in holding that *the mere filing of a petition upon which no action has been taken in New York* bars the entry of an effective *in personam* decree in this

case. Indeed petitioner's sworn Amended Complaint squarely alleges that the applicant in New York has in fact abandoned the New York Surrogate's proceedings and "would move to withdraw the same except for the fact that the said Surrogate has stated that he will refuse to permit such withdrawal" (R. 10).

CONCLUSION.

We conclude therefore:

1. That there is no want of authority in the District Court of the United States for the Northern District of Illinois, Eastern Division, to enter a valid order or decree *in personam* either (1) requiring respondent to transmit to petitionter the assets belonging to the decedent within its power and control wherever the same be located, or (2) to enter a money judgment and ordering execution for the monetary value thereof.

2. That a useless and expensive ancillary administration in New York which would serve no conceivable purpose, there being no New York creditors whatever, should be prevented and not fostered, especially where, as in this case, the New York Surrogate's Court has no power to make any final distribution of the assets in question.

Petitioner therefore prays that the decision of the Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the District Court dismissing the Amended Complaint should be reversed and the cause remanded to the trial court with instructions to proceed to a final decree therein.

Respectfully submitted,

LOUIS E. PENNISH,
Counsel for Petitioner.

NORMAN CRAWFORD,
Of Counsel.

IN THE

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OCTOBER TERM, 1943.

No. 675

JOHN T. DEMPSEY, AS ADMINISTRATOR OF THE ESTATE OF GABRIEL DE FONTARCE, DECEASED,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, A CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Dated February 26, 1944.

THE BUNTHORP-WARREN PRINTING COMPANY, 230 WEST JACKSON, CHICAGO

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To the Honorable, the Supreme Court of the United States:

Opinion Below.

The opinion of the Circuit Court of Appeals, rendered on November 12, 1943, and set out in the record on pages 141-148, is reported at 138 F. (2d) 663 (C. C. A. 7th, 1943, Advance Sheets, January 3, 1944).

Jurisdiction.

Petitioner seeks a writ of certiorari under Section 240 of the Judicial Code (28 U. S. C. A. § 347).

We submit that petitioner's assertion that the decision of the Circuit Court of Appeals "directly conflicts, upon

a question of Federal law, with all of the decisions of this Court and all of the other Circuit Courts of Appeals" (P. 5) is a gross misstatement, supported by not a single case in petitioner's brief. We submit that the decisions of the District Court and the Circuit Court of Appeals are in accord with the decisions of this Court, with all the authority upon the question decided therein and with sound legal principles. We further submit that these decisions and authority are so clearly correct in the premises that they furnish no justification whatsoever for the granting of the writ sought herein and the exercise by this Court of its jurisdiction to review.

Statement of the Case and Question Presented.

Because petitioner's "Summary Statement of Matters Involved" (P. 1-5) omits the bulk of the facts shown by the record and contains at least one misleading statement which is vital to the case, we are compelled to state the facts in respondent's brief, pursuant to Rule 27(4) of the Rules of this Court (28 U. S. C. A. following § 354). In doing so we follow to a great extent the statement of the case in the opinion of the Circuit Court of Appeals (R. 141-146).

The suit in the case at bar was brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, by the Illinois ancillary administrator of the estate of a non-resident alien decedent to gain possession of shares of stock of South African gold mining corporations left for safekeeping during his lifetime in the custody of respondent in New York (R. 1-10, 36). The orders of the District Court appealed from, and to review the affirmance of which this writ is sought (1) denied petitioner's motion, based on his amended and supplemental complaint, as amended, for a temporary re-

straining order and a preliminary injunction forbidding respondent to dispose of these securities until the further order of the court and preventing respondent from instituting or participating in any probate proceedings whatsoever except in the Probate Court of Cook County, Illinois, and (2) allowed respondent's motion to dismiss the amended and supplemental complaint, as amended, for failure to state grounds upon which relief could be granted. The orders were entered as of November 18, 1942 (R. 113-114).

The decedent was the Vicomte Gabriel de Fontarce, a French national and adherent of General de Gaulle (R. 4). He died in London, England, in June, 1941 (R. 35). He had not lived in France for many years prior to his death, but he was at the time of his death domiciled either in Great Britain, Egypt, Eire or France (R. 4-5). He left property in many parts of the New and Old World, including the securities involved in this controversy, which were deposited with respondent in New York City in November, 1940, and have remained in its vaults in that city since that date (R. 4-5, 36, 89). They consist of the following bearer shares:

1,000 Anglo-American Corporation of South Africa, Ltd.
6,500 Government Gold Mining Areas (Moderfontein Consolidated, Ltd.),
4,000 Randfontein Estates Gold Mining Co.,
12,000 African and European Investment Co., Ltd.

(R. 3, 13, 36, 84, 89.)

The stocks are known as "kaffirs," and they are treated by South African law as tangible property, and title to them passes by manual delivery, without endorsement (R. 4).

In September, 1941, a niece of the decedent who resided in New York filed her petition in the Surrogate's Court

for the County of New York for letters of administration on the estate of the decedent (R. 35), averring that the decedent died in June, 1941, a resident of either Great Britain or Eire (R. 35); that no will had been found disposing of his possessions in the United States (R. 35-36); that decedent died possessed of certain personal property in New York of a value not to exceed $120,000, listing the securities referred to above (R. 36); that he left him surviving, in addition to the petitioning niece, the following:

Maurice de Fontarce, age about 25, last heard of in occupied France,

Henri de Fontarce, age about 23, whose address was given in Brazil,

Jean Pierre de Fontarce, age about 39, last heard of in Morocco in 1933 (R. 37).

The relationship of these persons to the decedent was not defined, and the petition stated that decedent left no widow, child, issue of deceased child, or adopted child, and no other relatives than the four referred to above (R. 37).

Thomas Hart Fisher, a Chicago attorney (R. 48), represented the niece (R. 94, 100), and in the proceedings in the Surrogate's Court testified as to heirship and submitted an affidavit arguing that the decedent died intestate (R. 44-46, 48-49).

That application for letters was denied on November 27, 1941, for the reason that the record disclosed that decedent had left an English will, expressly limited to the disposition of his property in England and Ireland, in which he stated that his will dealing with his general estate was deposited with Maitre Eymin, notary, in the Principality of Monaco (R. 53-55). The Surrogate, in denying the application, stated that under the circumstances, the possible existence of a valid will disposing of the general estate, including the assets in New York, could not be ignored, and that although wartime conditions might delay

the obtaining of accurate information from the notary in Monaco, it was important that the existence or non-existence of the will be established, and also whether, if it were in existence, it was valid or invalid under the law of that principality (R. 54-55). He suggested alternative means for obtaining the necessary information, and stated that in the meantime, final disposition of the application would be held in abeyance (R. 55). (*In re de Fontarce's Estate*, 178 Misc. 10, 32 N. Y. S. (2d) 941.) This proceeding was still pending in November, 1942, according to the certificate of the clerk of the Surrogate's Court (R. 52).

On December 30, 1941, letters of administration were granted to The Trust Company of Chicago by the Probate Court of Cook County, Illinois, on the petition of Thomas Hart Fisher, an alleged creditor (R. 56-57), showing a waiver of the right to administer filed by the public administrator (petitioner herein), and an acceptance by The Trust Company of Chicago of the appointment if made (R. 58). According to the petition, the decedent left no will "effective in Illinois" and the estate consisted wholly of personal property of a value not to exceed $250 (R. 57). Thomas Hart Fisher and Norman Crawford entered their appearance as attorneys for The Trust Company of Chicago (R. 58). Proof of heirship was made on that day by the niece who had filed the New York application for letters (R. 62-63). In reply to a question as to whether the decedent had adopted any children she stated that she did not know, that, "He said he had two adopted sons" (R. 63). She did not mention the three persons listed in the New York petition (R. 37). Hence the proof of heirship showed that decedent's only heirs at law and next of kin, if any, and if living, were unknown; their names and addresses were unknown, and had not been ascertained upon due and diligent search and inquiry (R. 65-66). The niece who filed the petition in New York and who testified

in the Cook County proceeding was not mentioned in the declaration of heirship (R. 65-66).

Subsequently, on February 13, 1942, The Trust Company of Chicago was allowed to resign as administrator, and petitioner, the public administrator of Cook County, was appointed administrator *de bonis non*, with a direction to pay The Trust Company of Chicago $50 for its services (R. 69-70). On the same day, the Probate Court also allowed the claim of Thomas Hart Fisher, the creditor on whose petition the letters issued, for $7,513.77, for services found to have been rendered for decedent prior to his death (R. 71-72). On March 3, 1942, before the inventory was filed, the Probate Court authorized petitioner to file suit in the United States District Court for the Northern District of Illinois, against respondent, to recover the securities heretofore referred to, and to employ Norman Crawford as his attorney in the prosecution of that suit and to pay him 25% of anything recovered by such suit for his services (R. 79).

On March 9, 1942, more than sixty days after the issuance of letters, the Probate Court approved the inventory filed in the proceedings showing assets consisting of one trunk and various articles of wearing apparel and medicines of a total value of $50.25, and the kaffirs (value unknown) as the only property of the estate which had come to the sight or knowledge of the administrator (R. 81-83). The record also shows that on January 2, 1942, three days after the filing of Fisher's petition for letters of administration, and two months prior to the filing of the inventory, two trunks which had been received by the Harvard Club of New York for storage for the Vicomte de Fontarce on April 14, 1941, were taken from storage there by the Railway Express Company at the request of Fisher and checked on his railroad ticket to Chicago (R. 90-91). The record does not disclose whether one of these trunks formed the basis for

the averment of property in Cook County upon which the letters of administration were granted December 30, 1941, and if so, why the second one was not also included in the inventary approved March 9, 1942 (See R. 144).

Pursuant to the authority granted March 3, 1942, by the Probate Court of Cook County, petitioner filed his bill of complaint against respondent on March 7, 1942, attaching thereto as exhibits a certified copy of his letters of administration and an unverified copy of the inventory subsequently approved by the court on March 9, 1942.* The bill averred that appellant as administrator of the estate was then the lawful owner of the entire right, title and interest, legal and equitable, in the assets and securities heretofore described which it stated had a value of $120,000 (R. 3); that because of the complex facts as to the domicile of decedent, it would be impossible for either the Probate Court of Cook County or the court of the forum to determine his true domicile "except by evidence to be presented in said Probate Court or in this Court in the event the question of domicile of the decedent shall be relative to this proceeding" (R. 4); that decedent left no debts of any kind in the United States except in the State of Illinois (R. 4), and that he had never actually been in the United States except as a temporary visitor many years before his death (R. 5); that administration of his estate had been sought in England and Brazil, and possibly in the Irish Free State, France and Monaco, and that no such probate proceedings were pending in any state of the United States outside the Probate Court of Cook County, Illinois (R. 5); that respondent was on the date of the death of decedent the mere custodian of the securities, having no interest in them (R. 5), and that the estate in Cook County had assets

*The original bill of complaint and the date of its filing do not appear in the record herein, but do appear in the record in Nos. 662 and 663, October Term, 1942. Paragraphs 1-9 of the amended and supplemental complaint (R. 2) comprise the allegations of the original complaint.

not to exceed $250, other than the securities, and that the allowed claims against the estate were in excess of $7,500, hence the estate was and would be wholly insolvent unless it obtained the relief prayed in the bill (R. 5).

There were other averments as to petitioner's demand and respondent's refusal to turn over the securities (R. 5), their negotiability (R. 4), their fluctuating value and the danger that such value might be wiped out if the war terminted adversely to the Kingdom of Great Britain (R. 6); that respondent might attempt to institute temporary proceedings in some probate or surrogate court other than that of Cook County, thereby causing unnecessary loss, damage, costs and other expenses, and might prevent the prompt disposition or sale of the assets under order of the Probate Court of Cook County (R. 8). Petitioner therefore prayed that respondent be ordered to deliver over all the securities in its custody, or in the alternative, that it pay over the fair market value of such securities together with damages for their detention and the costs of the proceeding (R. 11). It also prayed that respondent be temporarily and permanently restrained from disposing of the securities, and from instituting any proceedings relating thereto in any court other than the Probate Court of Cook County (R. 11).

Subsequently, on May 26, 1942, petitioner amended his original bill, adding the further averments that on the date of decedent's death, there was on deposit in a special account in a Chicago bank, funds in excess of $500 and less than $6,000, placed there in September, 1940, and remaining since that date, not then reduced to possession by petitioner (R. 7) (The source of such funds is not shown nor why their existence in Chicago was not earlier known to Fisher who, as an item of the services rendered decedent for which his claim for $7,513.77 was allowed, alleged the "freeing, the unblocking and transfer from New York and

Chicago to (decedent) in Dublin and London and elsewhere" of sums aggregating $743,000 between August, 1940 and May, 1941 (R. 75)) (See R. 145-146); that no inheritance or other taxes were or would become due to the State of New York, and offering to procure a tax waiver from the proper authorities (R. 7-8); that under the New York laws, none of its courts had the power to distribute the assets of the estate, but that their sole power was to pay any existing debts due to New York creditors (of which the bill averred there were none), and then to remit the balance to the domiciliary administrator or executor of the estate (R. 8-9); that New York administration would result in unnecessary expense (R. 9). Petitioner in his bill also offered to pay the sum of $10.43 alleged to have been claimed as custodial fees for respondent's services, although he stated that fees theretofore paid were excessive in view of the value of the securities in its charge (R. 9); and that a "petition was filed in the Surrogate's Court of New York for letters of administration of the estate of said decedent by a niece of the decedent, but said petition has never been granted and no administration has ever been commenced by appointment of a representative of said estate in the State of New York," and no other action had been taken, and that court had not acquired any jurisdiction *in personam* over any representative of the estate or any jurisdiction *in rem* over any assets of the decedent (R. 10-11).

By his amended notice of appeal, filed December 18, 1942, petitioner appealed from the orders entered as of November 18, 1942, denying his motion for a temporary restraining order and a preliminary injunction and allowing respondent's motion to dismiss the amended and supplemental complaint, as amended. In the Circuit Court of Appeals Norman Crawford and Thomas Hart Fisher ap-

peared as attorneys on behalf of petitioner (R. 131, 139, 140).

Referring to the misleading statement in petitioner's "Summary Statement of Matters Involved", we call the Court's attention to the statement "Petitioner alleged that he was without knowledge as to the physical location of the certificates evidencing the securities sued for, but that (except for possible reference thereto) there were no assets or securities belonging to decedent in New York upon which any administration proceedings could be based." (P. 3). The cardinal fact of this case is that the securities for the possession of which this suit is brought were deposited by the decedent during his lifetime in the custody of respondent in New York, were located in respondent's vaults in New York at the date of the decedent's death and still remain there (R. 27, 36, 89, 142). Furthermore, petitioner's entire brief proceeds upon the assumption that the decedent did not leave these securities in Illinois but did leave them in New York.

On this state of facts, the question presented is as follows:

> Whether the ancillary administrator in Illinois of the estate of a non-resident alien decedent can compel the custodian of tangible personal property left by the decedent in New York, and still remaining there, to surrender it to him solely by virtue of the fact that the Illinois administrator can sue the New York custodian in a Federal court in Illinois, because the New York custodian is licensed as a foreign corporation to do business in Illinois.

We believe that the answer to this question must be in the negative and that the petition for a writ of certiorari should therefore be denied.

SUMMARY OF ARGUMENT.

I.

The amended and supplemental complaint, as amended, does not state grounds upon which relief can be granted because the securities involved in this case have no situs for administration in Illinois.

Ill. Rev. Stat. (1941) c. 3, § 207.
Goodrich, "Problems of Foreign Administration," 39 Harv. L. Rev. (1926) 797.
Story, Conflict of Law (8th ed. 1883) § 514.
3 Beale, Conflict of Laws (1935) § 471.5.
Mager v. *Grima*, 8 How. (U. S.) 490.
U. S. v. *Perkins*, 163 U. S. 625.
U. S. v. *Fox*, 94 U. S. 315.

II.

The only situs for the administration of the securities involved in this case is New York.

Iowa v. *Slimmer*, 248 U. S. 115.
In re Cornell's Will, 267 N. Y. 456, 196 N. E. 396.
Higgins v. *Eaton*, 202 Fed. 75; cert. den. 229 U. S. 622.
Tilt v. *Kelsey*, 207 U. S. 43.
Helme v. *Buckelew*, 229 N. Y. 363, 128 N. E. 216.
Overby v. *Gordon*, 177 U. S. 214.
Riley v. *New York Trust Co.*, 315 U. S. 343.
New England Mut. Life Ins. Co. v. *Woodworth*, 111 U. S. 183.
Irving Trust Co. v. *Day*, 314 U. S. 556.

III.

Answer to certain arguments of petitioner:

1. Answer to petitioner's argument that respondent could not be held liable in New York for wrongfully disposing of these securities by surrendering them to an administrator appointed by the court of a state having no jurisdiction over them.

Thompson v. *Whitman*, 18 Wall. (U. S.) 457.

Pennoyer v. *Neff*, 95 U. S. 714.

U. S. Const., Amendment 14, § 1.

2. Answer to petitioner's argument that no proceeding for administration of these securities is pending in the Surrogate's Court of New York.

Surrogate's Court Act, §§ 40, 44, 45, Clevenger's Practice Manual (1942).

Matter of Feinberg, 155 Misc. 844, 280 N. Y. Supp. 540.

Matter of Thorne, 123 Misc. 621, 206 N. Y. Supp. 69.

Matter of Daniels, 140 Misc. 89, 249 N. Y. Supp. 436.

Matter of Humpfner, 146 Misc. 461, 263 N. Y. Supp. 309.

Matter of Maginn, 215 App. Div. 790, 213 N. Y. Supp. 325.

Matter of Browning, 153 Misc. 564, 276 N. Y. Supp. 270.

Matter of Stephani, 164 Misc. 240, 300 N. Y. Supp. 813.

Matter of Mills, 171 Misc. 42, 11 N. Y. S. (2d) 929.

3. Answer to petitioner's arguments:

(a) That the New York Surrogate's Court has no power to distribute an ancillary estate in New York directly to

beneficiaries without transmission to the domiciliary administrator.

Surrogate's Court Act, §§ 159-166, Clevenger's Practice Manual (1942).

Despard v. *Churchill*, 53 N. Y. 192.

Dammert v. *Osborn*, 140 N. Y. 30, 35 N. E. 407; 141 N. Y. 564, 35 N. E. 1088.

In re Ryan's Will, 136 Misc. 261, 241 N. Y. Supp. 82.

Howard v. *Marlin-Rockwell Corp.*, 156 Misc. 358, 281 N. Y. Supp. 666.

In re Marinano Estate, 158 Misc. 825, 286 N. Y. Supp. 811.

In re Hughes, 95 N. Y. 55.

In re Rogers' Will, 225 App. Div. 286, 232 N. Y. Supp. 609; aff'd 254 N. Y. 592, 173 N. E. 880.

In re Martin's Will, 255 N. Y. 359, 174 N. E. 753.

Smith v. *Second National Bank*, 169 N. Y. 467, 62 N. E. 577.

U. S. Trust Co. v. *Wood*, 146 App. Div. 751, 131 N. Y. Supp. 427.

In re Meyer's Estate, 125 Misc. 361, 211 N. Y. Supp. 525; 244 N. Y. 598, 155 N. E. 913.

(b) That the New York Surrogate's Court has no power in the administration of an ancillary estate in New York to direct the payment of the claims of non-resident creditors.

In re Van Bokkelen's Estate, 155 Misc. 289, 279 N. Y. Supp. 420.

Hopper v. *Hopper*, 125 N. Y. 400, 26 N. E. 457.

In re Worch's Estate, 124 Misc. 380, 208 N. Y. Supp. 652.

In re Meyer's Estate, 125 Misc. 361, 211 N. Y. Supp. 525; 244 N. Y. 598, 155 N. E. 913.

Surrogate's Court Act, §§ 126-127, Clevenger's Practice Manual (1942).

(c) That the New York Surrogate's Court has no jurisdiction over an ancillary estate in New York in the absence of New York creditors.

Surrogate's Court Act, §§ 159-166, Clevenger's Practice Manual (1942).

(d) That administration of this ancillary estate in New York would be useless and wasteful.

In re Martin's Will, 255 N. Y. 359, 174 N. E. 753.

ARGUMENT.

I.

The amended and supplemental complaint, as amended, does not state grounds upon which relief can be granted because the securities involved in this case have no situs for administration in Illinois.

The principal defense in this case is that the assets for the possession of which this suit is brought by the Illinois administrator are and since November 4, 1940, long prior to the decedent's death, have been located in the City, County and State of New York in the vaults of respondent, and that for this reason the State of Illinois, the Probate Courts of Illinois, and the Federal court sitting in Illinois have no jurisdiction over such assets.

Under Illinois law the situs of tangible personal property of a non-resident decedent for purposes of administration is where the property is situated at his death.

Petitioner treats the kaffirs for the possession of which this suit is brought as tangible personal property rather than intangible choses in action (R. 3-4). Since these kaffirs constitute tangible personal property, it is perfectly clear under the Illinois Probate Act that an administrator appointed in that state would have no right or authority to take possession of them unless they had been left by the decedent in that state upon his death. Section 55 of this Act provides as follows with regard to the personal estate of a non-resident decedent:

> "§ 55. Situs of Personal Estate of Non-resident Decedent. For the purpose of granting administration of both testate and intestate estates of non-resident decedents, the situs of tangible personal estate

> is where it is located and the situs of intangible estate is where the instrument evidencing a debt, obligation, stock or chose in action happens to be, or where the debtor resides, if there is no instrument evidencing the debt, obligation, or chose in action in this state."
>
> Ill. Rev. Stat. (1941) c. 3, § 207.

But whether tangibles or intangible choses in action, these securities have no situs for administration in Illinois, since the kaffirs evidencing ownership in the South African gold mining corporations "happen to be" in New York.

It therefore seems perfectly clear that under Illinois law there is no jurisdiction for the ancillary administrator to seek to reach out beyond the borders of Illinois and draw into his possession tangible personal property left by the decedent in New York.

The section from the Illinois Probate Act which we have quoted above (Respondent's Brief, 15-16) does nothing more than state the common law rule of conflict of laws. It is universally recognized that an administrator appointed for one state or country cannot reach out beyond the jurisdiction of the state or country from which he derives his authority in order to collect foreign assets.

Judge Goodrich, in an article in the Harvard Law Review, states the law as follows:

> "It seems clear that property left in a state at the death of the owner is subject to that state's control, no matter where the domicil of the owner happened to be. Appointment of a representative at that domicil cannot make him the owner of the property; the law of the situs must do that, if it is to be done. Judicial language expressing this idea is plentiful. 'It is a principle of almost universal jurisprudence, recognized in England as well as in the American courts, with scarcely an exception, that the title of an executor or administrator does not extend beyond the territory of the government which grants it.' 'Nor can it (the

state of the domicil) invest the administrator with title to any movable property, except to such as may be found within its limits.' The state where the property is located may be concerned with it in several ways. One is with regard to taxing the succession. Another is that the property shall, before being distributed, be subjected to the payment of such claims as creditors may present. Another is that the state may claim it as *bona vacantia*, if there are no next of kin. And finally, the state may, though it seldom does, insist that it be distributed according to its rules, regardless of the domicil of the decedent."

Goodrich, "Problems of Foreign Administration," 39 Harv. L. Rev. (1926) 797, 812.

Also:

Story, Conflict of Law (8th ed. 1883) § 514.

3 Beale, Conflict of Laws (1935), § 471.5

Mager v. *Grima*, 8 How. (U. S.) 490, 493.

U. S. v. *Perkins*, 163 U. S. 625.

See:

U. S. v. *Fox*, 94 U. S. 315, 320.

The Circuit Court of Appeals is in accord with the decisions of this Court and all the authority on the question when it says in its opinion, referring to petitioner:

"By his grant of ancillary letters of administration he obtained only a special and limited authority to act in collecting and disposing of such personal property as the decedent left within the confines of the State of Illinois. 11 R. C. L. on Executors and Administrators, § 529; Woerner, American Law of Administration, 3rd Ed. Vol. I, § 157." (R. 147.)

II.

The only situs for the administration of the securities involved in this case is New York.

A necessary corollary of the rule that only the property within the jurisdiction of the state in which the probate court is sitting can be administered by that probate court is that the state in which a decedent's personal property is located at his death has an absolute right to administer that property through its probate proceedings. This is a sovereign right inherent in the state and enables the state to protect its creditors, its taxing authorities and those persons it recognizes as entitled to inherit, and in the event of an intestate dying without heirs, its own right to succeed to the property by escheat. Yet the claim of petitioner in this case is that because the Probate Court of Cook County has issued to him letters of administration upon certain assets in Illinois and because respondent is amenable to suit in the Federal Court in Illinois by service of process on its Illinois agent he can remove securities from the State of New York.

That he cannot do so is affirmatively demonstrated by *Iowa* v. *Slimmer*, 248 U. S. 115, 120-121.

In that case the decedent, domiciled in Iowa, removed a half million dollars worth of personal property to Minnesota, anticipating death and desiring to avoid Iowa inheritance taxes. Administration was taken out in Minnesota and the Minnesota executors refused to deliver any of these assets either to the State of Iowa or to the personal representatives appointed there. Iowa then brought a suit in the United States Supreme Court against the State of Minnesota and the Minnesota executors under the Supreme Court's original jurisdiction of suits between states. The

motion for leave to file the suit was denied on the merits after full argument of the case. Justice Brandeis said:

> "Substantially the whole of decedent's estate consisted of notes and bonds. Under an arrangement which had been in force for five years or more, these securities were, at the time of his death, in Minnesota in the custody and possession of an agent resident there. Minnesota imposes inheritance taxes; and its statutes provide (Minnesota Gen. Stats., 1913, § 2281) that no transfer of the property of a nonresident decedent shall be made until the taxes due thereon shall have been paid. Regardless of the domicil of the decedent, these notes and bonds were subject to probate proceedings in that State and likewise subject, at least, to inheritance taxes. Minnesota Gen. Stats., 1913 §§ 7205, 2271; *Bristol* v. *Washington County*, 177 U. S. 133; *Wheeler* v. *New York*, 233 U. S. 434. Furthermore, so far as concerns the property of the decedent, located at his death in Minnesota, the probate courts of that State had jurisdiction to determine the domicil. *Overby* v. *Gordon*, 177 U. S. 214. But even if decedent was not domiciled in Minnesota, its court had the power either to distribute property located there according to the terms of the will applicable thereto, or to direct that it be transmitted to the personal representative of the decedent at the place of his domicil to be disposed of by him. Minnesota Gen. Stats., 1913, § 7278; *Harvey* v. *Richards*, 1 Mason, 381. See *Wilkins* v. *Ellett*, 108 U. S. 256, 258."

Under the doctrine of this case, therefore, the State of New York could not be required either in its own courts, the courts of any other state, or in the courts of the United States to transmit assets to any other state even if such other state were the domicile of the decedent, but the State of New York could distribute such assets, pursuant to its laws, in any way it saw fit.

Also:

In re Cornell's Will, 267 N. Y. 456, 466, 196 N. E. 396, 400.

Higgins v. *Eaton*, 202 Fed. 75, 77; cert. den. 229 U. S. 622.

Tilt v. *Kelsey*, 207 U. S. 43.

Helme v. *Buckelew*, 229 N. Y. 363, 128 N. E. 216.

It follows from the fact that the state in which a decedent's property is located has an absolute right to administer it that one state cannot encroach upon the sovereignty of another by empowering an administrator appointed by it to remove from the other state property left there by the decedent. The State of Illinois has no sovereign power to authorize an administrator appointed by its Probate Court to remove these "kaffirs" from the sovereign State of New York.

Overby v. *Gordon*, 177 U. S. 214.

Riley v. *New York Trust Co.*, 315 U. S. 343, 349-350, 352-354.

In view of these cases we think it is clearly demonstrated that the Probate Court of Cook County and the Federal court sitting in Illinois do not have jurisdiction over the securities which are the subject matter or *res* involved in this case. These courts, therefore, cannot adjudicate in this or in any other proceeding the alleged claims of petitioner in and to the securities. Rather the Federal courts sitting in Illinois must leave to the properly constituted courts of the State of New York, within the jurisdiction of which the securities are located, the adjudication of any and all such alleged claims.

Petitioner argues extensively that he is entitled to get possession of this tangible property left by the decedent in New York by virtue of the fact that he has been able to serve the New York custodian of the property with process

in Illinois, thereby subjecting the custodian to the jurisdiction of the Federal court sitting in Illinois (Petitioner's Brief, 9-17).

New England Mut. Life Ins. Co. v. *Woodworth*, 111 U. S. 138, the case upon which petitioner principally relies (for companion cases, see Petitioner's Brief, 9-13), is as follows, as stated by the Circuit Court of Appeals:

> "It held that the Illinois-domiciled husband of a New York-domiciled wife might, upon her death, obtain letters of administration in Illinois upon a showing of property belonging to her, consisting of an insurance policy payable to her, her executors or administrators, which he held in Illinois, giving him a claim as administrator against the insurer, qualified to do business in Illinois, and that being the case, sufficiently domiciled there to make its policy which created a simple contract debt, an asset there for the purposes of administration. This is in no way analogous to the situation here involved." (R. 147.)

Respondent owes the decedent's estate no money. There are simply securities left by the decedent in New York. Whether these securities, as in petitioner's view, are tangibles or whether they are intangibles represented by stock certificates, since the decedent was not domiciled in the United States and the kaffirs evidencing the decedent's ownership in the South African corporations were left by him in New York, there is absolutely no point of contact between these securities and the State of Illinois.

The fact that respondent has been served with process in Illinois does not change its relation to this decedent from that of a bailee to that of a debtor. Before the death of the Vicomte the relationship between him and respondent was that of bailor and bailee (Cf. Petitioner's Brief, 14). However, on his death the title to these securities devolved not on any administrator appointed through its probate courts by the State of Illinois, but rather on such

persons as the State of New York pursuant to its laws may adjudge to be their lawful owner. Therefore the defense in this action is that petitioner as administrator *de bonis non* in Cook County has no title or right of ownership in and to these securities and that the State of New York has the right to impose such restrictions on their transfer as it wishes or limit their transfer in any way it sees fit. *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562.

The true rule is that in no matter how many states and foreign countries this respondent can be found by the service of process upon its agents, nevertheless the one and the only state which has jurisdiction to administer upon these kaffirs left in its custody by a person subsequently dying is the state where such kaffirs are physically located. That state is New York.

As pointed out by the Circuit Court of Appeals, the fallacious point in petitioner's reasoning is where he argues that he stands in the shoes of the decedent with respect to this property (R. 147). The point is that petitioner does not stand in the shoes of the decedent. Petitioner only has whatever right to these securities the Probate Court of Cook County gave him. Because the situs for the administration of these securities was not in Illinois, the Probate Court of Cook County lacked jurisdiction to give plaintiff any right to these securities. The only person who can stand in the shoes of the decedent, so far as these securities are concerned, is an administrator appointed in the state where they were located at the date of his death, namely, New York.

As the Circuit Court of Appeals said in its opinion:

> "Appellant appears to think that he stands in the shoes of decedent and holds all rights which would have been enforcible by decedent. Such is far from the case. * * * Certainly the Woodworth case does not contemplate that a public administrator obtaining an-

> cillary letters upon an allegation of property in the state at the time of a non-resident decedent's death, may thereupon require that all property belonging to his decedent in other foreign states be brought into the state for him to administer. That there are allowed claims of Illinois creditors which cannot otherwise be paid in Illinois does not enlarge his authority." (R. 147.)

Petitioner argues that a court of equity may by its decree require a defendant to take action affecting property in another state (Petitioner's Brief, 13), and he further endeavors to assimilate this case to the situation presented by *New England Mut. Life Ins. Co.* v. *Woodworth* by saying that an action in detinue is for money as well as for property if the property is damaged or withheld (Petitioner's Brief, 15). His theory here is that, since an equity court may in a proper case require a defendant to take out-of-state action, a debt is created having a situs for administration in Illinois upon the refusal of respondent to surrender this property to petitioner. Again we urge that the conclusion does not follow from the premise.

We readily concede that in a proper case an equity court may enter a decree *in personam* affecting property not within its jurisdiction. But such a decree, to be proper, can only be for the enforcement of the rights of the person lawfully entitled to such property. We likewise concede that where a bailee wrongfully withholds property from its true owner, an action of detinue will lie, leading to a money judgment, but this is only true when property is withheld from the proper owner. If property is withheld from a person who is not entitled thereto, as in the case at bar, it is obvious that that person cannot sue to collect a money judgment because of the bailee's refusal to surrender the property. The right to collect a money judgment only arises in favor of the person lawfully entitled to the prop-

erty. As we have demonstrated, the petitioner in this case has no right to the property because the Probate Court of Cook County was entirely without jurisdiction to give it to him. Thus the attempted analogy with *New England Mut. Life Ins. Co.* v. *Woodworth* entirely fails.

III.

In view of the argument above we do not believe that anything more need be said to show that the decisions of the District Court and the Circuit Court of Appeals in this case were correct, and there is no occasion for this Court to grant the writ of certiorari sought by petitioner. However, there are certain statements in Petitioner's Brief which, lest they lead this Court to the belief that there is some equity in petitioner's case, we cannot permit to go unchallenged. We now take these up briefly and in the order in which they appear in Petitioner's Brief.

1. Petitioner says that we argued in the courts below that respondent "would not be protected from double liability in New York or elsewhere if the Illinois Federal Court in this case entered an *in personam* decree against the respondent", and that this argument "was not sustained in the Circuit Court of Appeals." (Petitioner's Brief, 16). We urged upon the District Court and the Circuit Court of Appeals our view that if a court sitting in Illinois should order this respondent to surrender securities over which neither the Probate Court of Cook County, Illinois, nor the Federal District Court sitting in Illinois have any jurisdiction whatsoever, a court sitting in New York would not be required to respect such a decree, and that respondent might later be held liable in some New York court, whether at the suit of the decedent's New York heirs, if any, the New York State Tax Commission, other and now unknown New York creditors, or any other per-

sons who might ultimately be held by a court of New York to have an interest in the decedent's New York estate. We were of this view because it has always been held that the jurisdiction of a court to enter a decree may be attacked collaterally and a decree rendered by a court having no jurisdiction need not be accorded faith and credit by other tribunals.

Thompson v. *Whitman*, 18 Wall. (U. S.) 457.
Pennoyer v. *Neff*, 95 U. S. 714.

We therefore gave as an additional argument below that thus to subject respondent to a double liability would be a deprival of its property without due process of law contrary to the Fourteenth Amendment of the United States Constitution.

U. S. Const., Amendment 14, § 1.

Furthermore, in our brief in the Circuit Court of Appeals we analyzed every one of the cases cited by petitioner (Petitioner's Brief, 16-17), and demonstrated that they do not support his view that if respondent should surrender these securities pursuant to the decree of a court sitting in Illinois having no jurisdiction over them, such decree would be a bar to any other claim against respondent on their account.

However, the Circuit Court of Appeals did not find it necessary to refer to our argument on this point because of its holding that an administrator appointed in Illinois has no jurisdiction to collect tangible personal property left by a decedent in New York. Therefore it does not appear to us that petitioner can now say that our argument in this respect "was not sustained in the Circuit Court of Appeals." Moreover any inference that our argument on this point was examined and rejected by that court is entirely false.

2. Petitioner chides us, and also the District Court and

the Circuit Court of Appeals, for taking the position that a proceeding for the administration of these securities is already pending in the Surrogate's Court of New York (Petitioner's Brief, 18-20; R. 113, 147), especially as our view on this point, and the view of the courts below, is directly contrary to the allegation in the amended and supplemental complaint that no administration proceedings are pending in New York "because no appointment of an administrator and no other action has ever been taken in said proceedings," and because "said Surrogate Court of New York has not acquired any jurisdiction *in personam* over any representative of said estate or any jurisdiction *in rem* over any assets or securities or other properties of Gabriel de Fontarce whatsoever." (R. 10, Petitioner's Brief, 20).

Under New York law probate administration is commenced and the Surrogate's Court acquires jurisdiction as soon as an application for letters has been filed and prior to the appointment of an administrator.

Surrogate's Court Act, §§ 40, 44, 45, Clevenger's Practice Manual (1942).

Matter of Feinberg, 155 Misc. 844, 845, 280 N. Y. Supp. 540, 541.

Matter of Thorne, 123 Misc. 621, 206 N. Y. Supp. 69.

Matter of Daniels, 140 Misc. 89, 249 N. Y. Supp. 436.

Matter of Humpfner, 146 Misc. 461, 263 N. Y. Supp. 309.

Matter of Maginn, 215 App. Div. 790, 213 N. Y. Supp. 325.

Matter of Browning, 153 Misc. 564, 276 N. Y. Supp. 270.

Matter of Stephani, 164 Misc. 240, 300 N. Y. Supp. 813.

Matter of Mills, 171 Misc. 42, 11 N. Y. S. (2d) 929.

The Circuit Court of Appeals, in dealing with petitioner's argument that no proceeding is pending for the administration of the securities in New York, said:

> "Appellant proceeds on the theory that a proceeding initiated in New York for ancillary administration could be and was abandoned by the petitioning alleged heir, and that thereafter the New York Surrogate's Court lost all jurisdiction over the proceeding and the assets, although its records showed that the proceeding was still pending and the published opinion of the Surrogate showed that he was holding it in abeyance pending receipt of further information necessary to a correct decision, and of course, the assets remained in New York. We cannot agree with appellant's theory. That court had assumed jurisdiction upon the filing of the petition which it stated was filed on the theory that the decedent died intestate; it was its duty to retain that jurisdiction for the purpose of administering the assets within the state or transmitting them to the domiciliary executor or administrator when his identity was ascertained." (R. 147-148.)

It is obvious that a proceeding for the administration of these assets is presently going on in New York, since the Surrogate has rendered an opinion holding the decedent's niece's application "in abeyance" and the clerk of the Surrogate Court has certified that the matter is still pending (R. 55, 56).

3. Petitioner argues that ancillary administration in New York would be "utterly useless and wasteful of the assets concerned and would be beyond the power or authority of the Surrogate Court of New York" basing his opinion upon the proposition that the New York Surrogate's Court has no power to make a final distribution of the assets directly to the decedent's ultimate heirs or distributees and has no authority to direct the payment of the claims of non-resident creditors and the further propo-

sition that no ancillary administration is lawful in New York unless there are New York creditors (Petitioner's Brief, 18-19). Petitioner's argument as to the New York law on these points is entirely wrong.

(a) The Surrogate's Court has complete power to distribute an ancillary estate in New York directly to beneficiaries without transmission to the domiciliary administrator.

Surrogate's Court Act, §§ 159-166, Clevenger's Practice Manual (1942).

Despard v. *Churchill*, 53 N. Y. 192, 199.

Dammert v. *Osborn*, 140 N. Y. 30, 35 N. E. 407; 141 N. Y. 564, 35 N. E. 1088.

In re Ryan's Will, 136 Misc. 261, 264, 241, N. Y. Supp. 82, 85.

Howard v. *Marlin-Rockwell Corp.*, 156 Misc. 358, 360, 281 N. Y. Supp. 666, 669.

In re Marinano Estate, 158 Misc. 825, 827, 286 N. Y. Supp. 811, 813.

In re Hughes, 95 N. Y. 55.

In re Rogers' Will, 225 App. Div. 286, 232 N. Y. Supp. 609; aff'd 254 N. Y. 592, 173 N. E. 880.

In re Martin's Will, 255 N. Y. 359, 362-363, 174 N. E. 753.

See:

Smith v. *Second National Bank*, 169 N. Y. 467, 62 N. E. 577.

U. S. Trust Co. v. *Wood*, 146 App. Div. 751, 131 N. Y. Supp. 427.

In re Meyer's Estate, 125 Misc. 361, 211 N. Y. Supp. 525; 244 N. Y. 598, 155 N. E. 913.

Whether distribution will be made direct or the assets remitted to the domiciliary administrator rests entirely within the discretion of the Surrogate.

(b) Furthermore, the Surrogate's Court has complete power in the administration of an ancillary estate to direct the payment of the claims of the decedent's non-resident creditors.

In re Van Bokkelen's Estate, 155 Misc. 289, 293-294, 279 N. Y. Supp. 420, 425.

Hopper v. *Hopper*, 125 N. Y. 400, 404, 26 N. E. 457, 458.

See:

In re Worch's Estate, 124 Misc. 380, 208 N. Y. Supp. 652.

In re Meyer's Estate, 125 Misc. 361, 211 N. Y. Supp. 525; 244 N. Y. 598, 155 N. E. 913.

Again, it is a matter for the Surrogate's discretion, whether nonresident creditors shall be paid direct or must look to the domiciliary administrator. We would not suggest that the claim of Thomas Hart Fisher for $7,513.77 for alleged legal services should be allowed by the Surrogate's Court, but it is clear that the Surrogate's Court has jurisdiction to entertain such a claim, and, if proved, to permit its satisfaction out of the decedent's New York estate.

Furthermore, in the event that a long delay in determining whether the decedent died testate or intestate with respect to his New York property should occur and no appointment of an administrator could under New York law be made for sometime, any danger resulting to the estate by reason of the fluctuating value of these assets may be avoided under the provisions of Sections 126 and 127 of the Surrogate's Court Act, which provide for the appointment of a temporary administrator and the immediate liquidation of property, if necessary. In speaking of these sections of the Surrogate's Court Act, the Circuit Court of Appeals said:

"Due to the exigencies of the war, it may be some time before final determination (as to whether dece-

> dent died testate or intestate as to his New York estate) may be had. In the meantime, if it appears that the delay is likely to result in loss to the estate, under the provisions of section 126 of the Surrogate's Court Act, a temporary administrator may be appointed on the application of a creditor or a person interested in the estate, and by section 127, this administrator may be authorized by the surrogate to sell such personal property as it appears to be necessary to sell for the benefit of the estate. Hence we find no basis for appellant's apprehension of loss if the assets are not removed from New York and brought under the jurisdiction of the Probate Court of Cook County, Illinois."

(c) The jurisdiction of the Surrogate's Court to administer the assets of a non-resident decedent does not depend upon the presence or absence of creditors in New York, but depends upon the presence or absence of property in New York. Surrogate's Court Act, §§ 159-166, Clevenger's Practice Manual (1942). It is notable that of five cases cited by petitioner on this point only one is a New York case and this does not support him (Petitioner's Brief, 18).

(d) Petitioner is right in his belief that the policy of the New York courts is opposed to useless and wasteful duplication of administrations (Petitioner's Brief, 19). However, petitioner has so twisted the application of Judge Cardozo's opinion in *In re Martin's Will*, 255 N. Y. 359, 174 N. E. 753, as to give that case an absurd application. In that case the New York Court of Appeals affirmed the Surrogate's Court in granting direct distribution and in refusing to remit the ancillary New York estate to the domiciliary administrator in Connecticut. The Court said:

> "The state of Connecticut has petitioned the Surrogate's Court of the County of New York to direct the executor of a will to remit the assets of the estate to an administrator c. t. a., appointed in Connecticut, the domicile of the testatrix.* * *

"The Surrogate in denying the petition placed his ruling upon two grounds. He held that to return the assets for such a purpose would be equivalent to the enforcement by one state of the tax laws of another, *State of Colorado* v. *Harbeck*, 232 N. Y. 71, 133 N. E. 357. He held, apart from that principle, that the relief should be refused in the exercise of a sound discretion, since compliance with the demand would result in a depletion of the assets by the unnecessary expenses of a double administration. The Appellate Division unanimously affirmed." * * *

"Return, even though not forbidden by a hard and fast rule, is certainly not relief to be demanded as of right. At most, it is to be granted or refused in the exercise of a discretion that will give heed to all the facts. *Matter of Hughes*, 95 N. Y. 55, 60; cf. *Matters of Roger's Will*, 225 App. Div. 286, 232 N. Y. S. 609; Id., 254 N. Y. 592, 173 N. E. 880. The executor in New York conveyed repeated offers to the taxing officers in Connecticut to make payment of any tax found owing at the domicile. What he refused was a wasteful duplication of administrations and accountings. In the review of such an order the jurisdiction of this court is limited to a determination of the law. Discretion is not revised except for manifest abuse."

We submit that this case furnishes no possible support for petitioner's argument that an administrator appointed in Illinois, and an ancillary administrator at that, can go to New York and remove the decedent's property there without so much as a "by your leave" to the New York Surrogate's Court, New York creditors, and respondent, which is custodian of the property and will be answerable in New York with regard to its proper disposition.

As to the alleged wastefulness of administration in New York, if petitioner should win this case, one-fourth of the entire estate would be paid to his counsel as attorney fees (R. 79). The remainder of the assets would then become liable to satisfy the claim of Thomas Hart Fisher

for $7,513.77 for alleged legal services, which was allowed by the Probate Court of Cook County on the same day that petitioner was appointed administrator, and at a time when the only inventoried assets subject to administration in Illinois consisted of clothing and medicine appraised at a value of $50.25 (R. 13, 80). Finally, petitioner would collect fees for handling securities of large value none of which were in Illinois at the date of the decedent's death.

Conclusion.

From what has been said, it is clear that both the order of the District Court denying petitioner's motion for a temporary restraining order and a preliminary injunction and the order allowing respondent's motion to dismiss the amended and supplemental complaint, as amended, for failure to state grounds upon which relief could be granted, were correct, and were properly affirmed by the Circuit Court of Appeals for the reason that petitioner as ancillary administrator in Illinois has no right, title or interest in and to tangible personal property or securities left by a nonresident alien decedent in the custody of respondent in New York, notwithstanding the fact that respondent is licensed to do business in Illinois. For this reason we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated February 26, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 675

JOHN T. DEMPSEY, as Administrator of the Estate of Gabriel de Fontarce, Deceased,
Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, a Corporation,
Respondent.

REPLY BRIEF FOR PETITIONER

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Respondent.

REPLY BRIEF FOR PETITIONER

With due respect petitioner submits that, although respondent has stated numerous propositions and has cited a long series of cases, including many in this Court, in its brief, none of them destroys or impairs the decisive effect in this case of *New England Life Insurance Co.* v. *Woodward,* 111 U. S. 138, and *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, as well as the numerous

Circuit Court of Appeals decisions following them, including *Smith* v. *New York Life Insurance Co.*, 57 F. 133; 67 F. 694, and *London, Paris & American Bank* v. *Aronstein*, 117 F. 601.

Indeed, with the single exception of the *New England Life Insurance Co.* case, respondent fails to consider or even refer to the many decisions cited above and on page 12 of our petition, all of which hold that where a defendant can properly and lawfully be sued by an ancillary administrator in the jurisdiction of his appointment, so that the local court, whether Federal or State, has complete *in personam* jurisdiction over the defendant to enter any proper and lawful *in personaum* decree against the defendant in such proceeding.

This, we submit, is precisely the situation in the case at bar.

I.

Respondent first maintains (p. 15) that the amended and supplemental complaint is ineffective in this cause "because the securities involved in this case have *no situs for administration in Illinois,*" citing Section 55 of the Illinois Probate Act.

We reply to this proposition that Section 55 of the Illinois Probate Act *has no relation whatever* to the situs of tangible personal property "for (purposes of) administration" because Section 55 specifically states that it relates *only* to situs "for the purpose of *granting* administration of both testate and intestate estates of non-resident decedents." In other words, all that this section means and provides is that an Illinois administration can-

not be *founded in the first instance* upon such securities as these *while they are outside Illinois, i.e.,* before they are brought into Illinois. It does not provide that they cannot be administered in Illinois like any other tangible personal property which may be brought, either voluntarily or by suit, into the possession or control of an Illinois administrator. (See cases cited, pages 9-12 and 16-17 of petitioner's brief.)

Obviously the respondent cannot attack (and on page 20 of its brief in the Circuit Court of Appeals in this case *it admitted that it is not attacking*) "the *granting of administration to plaintiff* by the Probate Court of Cook County," "in view of the fact that there was located in Illinois a fund on deposit in a Chicago bank to the credit of the decedent at the date of his death," which the complaint specifically alleges, and respondent likewise admits, "is sufficient basis for the *granting* to him of letters of administration *de bonis non* by the Probate Court of Cook County (Rec. 7)" (p. 3 of respondent's brief below).

Indeed, it has always been held that the appointment of an administrator *cannot be collaterally attacked* in another proceeding.

Northwestern Mutual Life Ins. Co. v. *Johnson,* 275 F. 757.

Rice v. *Metropolitan Life Ins. Co.,* 238 S. W. 772.

Here and elsewhere in its brief (pp. 16, 18, 31) respondent claims that "under Illinois law there is no jurisdiction for the ancillary administrator *to seek to reach out beyond the borders of Illinois* and draw into his possession tangible personal property left by the decedent in New York." This is a "straw man." Petitioner by suing *in Illinois* is not "reaching out beyond the jurisdiction" of the state of his appointment, to wit, Illinois; nor

by suing *in the Federal Court in Illinois* does petitioner ask this Court to assume any "extra-territorial jurisdiction or authority." It is petitioner's whole case, exactly as in the *New England* and *Equitable Life Assurance Society* cases, that by seeking an *in personam* judgment which is *plainly within the jurisdiction of the Federal Court of Illinois*, petitioner is not "reaching out beyond the jurisdiction" or seeking "extra-territorial jurisdiction or authority."

The only authority cited by respondent (pp. 16-17) to support such a proposition is contained in the writings of three law professors and three cases decided in this Court, none of which has the slightest relevancy to this question. On the contrary, the cases we have cited in petitioner's brief (pp. 9-14) are in point and specifically hold that an ancillary administrator may sue to recover any property by an *in personam* decree in any case properly brought against the defendant, in the jurisdiction of his appointment, whether by that decree the defendant is required (1) to pay any money, or (2) to take any action regarding either *real* property, or *tangible or intangible personal* property, even though the carrying out of such a decree would involve doing an act or affecting a thing in a foreign state.

In other words, we have shown in our brief (pp. 9-16) that the Illinois Federal Court in this case *has complete jurisdiction, authority and power* to enter an *in personam* decree against this defendant, which is lawfully admitted to and is doing business in Illinois, in an action such as this which seeks to require the defendant either (1) to pay money or (2) to deliver up securities in its possession or power, regardless of whether the money or securities may come from an account or vault in a Chicago or a New York bank.

II.

Respondent's next proposition (p. 18) is that New York "has an absolute right to administer" the property here involved, and that "this is a *sovereign right inherent* in the state and enables the state *to protect its creditors*, its *taxing authorities* and *those persons* it recognizes as *entitled to inherit*, and in the event of an intestate dying without heirs, *its own right to succeed to the property by escheat.*"

Before pointing out that the authorities cited to support this proposition do not so hold, we show in passing that the sworn complaint in this case alleges (1) that *there are no New York creditors* of this decedent's estate; (2) that *there is no inheritance tax* due in the State of New York; (3) that under New York law the New York courts could *not* determine the succession to this property, but would have to transmit the securities or remit the proceeds of their sale to the domiciliary administrator; and (4) that there are living heirs of the decedent so that *this property could not conceivably pass to the State of New York by escheat* (R. 4-10).

Respondent appears to rely (pp. 18-19) in this connection principally upon the case of *Iowa* v. *Slimmer*, 248 U. S. 115. We submit that this case has no conceivable application to the case at bar. It held that the *State of Iowa* could not sue in *Minnesota* to enjoin the administration of assets which were in the possession of the *Minnesota* administrator. It was not held that if there had been no administrator appointed in Minnesota and if the assets were in possession of a bank or insurance company doing business in Iowa, *an Iowa administrator could not sue to recover the securities or their value in money in a suit brought not in Minnesota, but in Iowa.*

In the *Slimmer* case the State of Iowa sued in the State of Minnesota, while in the case at bar the Illinois administrator (not the State of Illinois) is suing in the Illinois courts. There is no parallel whatever in these two situations. To make the *Slimmer* case applicable, the State of Illinois, not petitioner, would have to be suing in the present case *in the New York court to prevent New York from administering these securities.* The State of Illinois is making no such effort, nor is there any New York administrator who is in possession and resisting any such claim.

As for the cases cited on page 20 of respondent's brief, *In re Cornell's Will,* 267 N. Y. 456; *Tilt* v. *Kelsey,* 207 U. S. 43; and *Helme* v. *Buckelew,* 229 N. Y. 363, related only to the issue of *decedent's domicile,* as did the cases of *Overby* v. *Gordon,* 177 U. S. 214, and *Riley* v. *New York Trust Co.,* 315 U. S. 343; and *Higgins* v. *Eaton,* 202 Fed. 75, had to do only with *the decedent's testamentary capacity.* These cases have nothing whatever to do with the suit at bar in which *neither domicile nor testamentary capacity* is involved. They merely held that a decision as to *domicile* or *testamentary capacity* in one jurisdiction is not binding throughout the world under the doctrine of *res judicata,* which is irrelevant here. The meaning and effect of these cases is that the courts of each state can adjudicate all issues *in personam* between any parties subject to its *in personam* jurisdiction. In other words, it is jurisdiction *in personam* over the respondent, rather than jurisdiction over the securities *in rem,* which the Federal court is asked to take in this case.

Respondent says (p. 21) that "Respondent owes the decedent's estate no money." The complaint in this case seeks a money judgment as well as possession of the securities (R. 11).

Respondent also says (p. 21) that "there is absolutely *no point of contact* between these securities and the State of Illinois." Yet in its brief in the Circuit Court of Appeals (p. 43), respondent admitted that: "It is perfectly true that had he (decedent) in his lifetime brought an action in the courts of Illinois to recover possession of these securities defendant (respondent) would have had to surrender them to him." Clearly there is exactly the same "point of contact" between respondent and the decedent in his lifetime as between respondent and his Illinois ancillary administrator after his death. That "point of contact" is the respondent itself, which is doing business in Illinois and which has duly appointed an Illinois agent upon whom jurisdiction *in personam* can be had, and which is thereby rendered fully subject to the Illinois Federal Court's jurisdiction in this case. That was the situation in each of the cases cited on pages 9-13 of our brief, in each of which the local administrator (whether ancillary or domiciliary) was held entitled to sue and procure any *in personam* relief against any defendant amenable in the local courts to an *in personam* decree.

Actually respondent has confessed its case away, we submit, in the following statement on page 23 of its brief:

> "*We readily concede* that in a proper case an equity court may enter a decree *in personam* affecting *property not within its jurisdiction.* But such a decree, to be proper, can only be for the enforcement of the rights of the person lawfully entitled to such property. *We likewise concede that where a bailee wrongfully withholds property from its true owner, an action of detinue will lie, leading to a money judgment,* but this is only true when property is withheld from the proper owner." (Italics added.)

Respondent then goes on to maintain that "the Probate Court of Cook County was entirely without juris-

diction" to award a right to the property to the petitioner in this case by a decree *in rem*. The argument is that the *New England Life Insurance Co.* case does not apply because in that case an *in personam* decree was sought, whereas in the case at bar an *in rem* decree is sought. The argument (pp. 23-4) proceeds upon a misunderstanding of the decree sought in this case. An examination of petitioner's complaint shows clearly that he is seeking only *in personam* relief; and in arguing that petitioner seeks an *in rem* decree, which is impossible in a law action *in detinue* such as this, the respondent is simply changing the entire basis of the proceeding to suit its own purposes in attempting to defeat the uniform rule announced in the *New England Life Insurance Co., Equitable Life Assurance Society,* and other Federal cases cited in our petition.

"The true rule" urged by respondent (p. 22) is as follows:

> "The true rule is that in no matter how many states and foreign countries this respondent can be found by the service of process upon its agents, nevertheless the one *and the only state* which has jurisdiction to administer upon these kaffirs left in its custody by a person subsequently dying is the state where such kaffirs are physically located. That state is New York." (Italics added.)

A moment's consideration will show that this certainly cannot be "the true rule" because of its possible consequences. Let us suppose that the respondent actually held these securities in its possession and control in any state in which it was *not* actually doing business and where, therefore, *it could not be effectively sued.* If the "true rule" were that enunciated by respondent, these securities could not then be administered *anywhere.* In that sit-

uation a local administration in such state would not result in the local administrator getting possession of the securities unless they were voluntarily surrendered, since the respondent holding their possession could not be effectively sued in that state; and under this asserted "true rule" it could also not be sued *to deliver these securities or their value to the local administrator* in any other state.

In other words, under this so-called "true rule," if no administration of these securities were possible in New York, as might easily occur in another case if the defendant did no business there, the securities would be forever lost to the decedent's estate. Clearly if they were concealed in respondent's vault in some state in which it was not doing business, no *in rem* proceeding could locate them, and the respondent could not be compelled to produce them for administration voluntarily.

Moreover, any such "true rule" as is here enunciated would tend to multiply beyond all reason the unnecessary and expensive ancillary administrations of decedents' estates in the forty-eight States of the Union, as we show more fully below.

If the tables were turned and in this case a New York ancillary administrator were suing an Illinois bank doing business in New York, it takes little imagination to envisage the vigor with which the New York court would assert its right to administer these securities if it had, as in this case, full *in personam* jurisdiction over the defendant, *regardless of where the securities might actually lie.*

In other words, we submit, the doctrine of the *New England Life Insurance Co.* and the other Federal cases, which has been unimpaired in both the Federal and State

Courts for more than half a century until the decision in this case, should not be upset, especially when the result would be to cause useless and expensive administrations of decedent's estates in a country where, as in the United States, there are forty-eight possible jurisdictions for probate administration of any decedent's estate.

If ever public policy required that a clear decision on this important issue in probate law be decided by this Court, we believe it is in this case.

III.

1. Respondent next replies (p. 24) to the cases cited in our brief (pp. 16-17), all holding that respondent cannot be subject to double liability if it be required by an effective *in personam* decree in this case in Illinois to turn these securities over to the Illinois administrator.

Respondent replies to these cases by claiming (pp. 24-5) that it would be held doubly liable on account of delivering up these very assets because "respondent might later be held liable in some New York court, whether at the suit of the decedent's New York heirs, if any, the New York State Tax Commission, other and now unknown New York creditors, or any other persons who might ultimately be held by a court of New York to have an interest in the decedent's New York estate."

We wonder why the respondent ignores the cases holding directly to the contrary in our brief. Moreover, we have shown that the complaint itself specifically alleges (1) that the only New York heir has, in effect, consented to a decree in favor of petitioner in the Federal Court in Illinois; (2) that there are no New York State succession taxes due on this estate, because the decedent was a non-

resident and the property is personal property, not real estate; and (3) that there are no other New York creditors having an interest in the decedent's New York estate (R. 7-11). Thus even if a decree in the Federal Illinois Court could be collaterally attacked, which is denied by every one of the cases cited on pages 16-17 of our petition, there are in this case no persons who could make such an attack in existence.

2. Respondent next devotes several pages (25-7) to the contention that: "Under New York law probate administration is commenced and the Surrogate's Courf acquires jurisdiction as soon as an application for letters has been filed and prior to the appointment of an administrator," citing a long list of Surrogate's Court decisions.

But on page 4 of its brief respondent admits that "*application for letters* (in the New York Surrogate's Court in this estate) was *denied* on November 27, 1941." Moreover, none of the cases cited have any applicability to the case at bar. None of these cases holds that an estate is "pending" in the Surrogate's Court of New York in the sense involved in this litigation in Illinois, to wit, by the appointment of an administrator or by the taking of possession of the securities in question. Every one of respondent's cases holds that *in the race between the several Surrogates' Courts of the various New York Counties* to administer a decedent's estate, the one in which a petition is first filed takes precedence over the others under the local New York statute.

That this is merely a question of local New York law, without any significance in this case, is clearly shown by Section 45 of the Surrogate's Court Act cited (p. 26) by respondent, which states that the Surrogate's Court in New York acquires exclusive jurisdiction of an estate

only when "letters testamentary or of administration *have been duly issued*" by that Court. *That is not the situation here.* For example, in *Matter of Feinberg,* 280 N. Y. S. 540, cited on page 26 of respondent's brief, it was not merely the filing of the petition but the *exercise of jurisdiction* by the Surrogate's Court of New York County which excluded the subsequent *exercise of jurisdiction* by the *Surrogate's Court of King's County.*

Clearly the Surrogate's Court of New York having *denied* the application for letters on November 27, 1941, and *said proceeding having been in fact abandoned,* as alleged in the complaint, without the appointment of any representative of the estate in New York (R. 10), it is plain that respondent's contention that the Surrogate's Court of New York has obtained exclusive jurisdiction *in rem* over these securities by the appointment of an administrator cannot be sustained.

3. In answer to petitioner's contention that an ancillary administration of these securities in New York would be "utterly useless and wasteful of the assets concerned," respondent asserts (pp. 27-32) (a) that the New York Surrogate's Court has "complete power to distribute an ancillary estate in New York directly to beneficiaries without transmission to the domiciliary administrator"; (b) that the New York Surrogate's Court "has complete power in the administration of an ancillary estate to direct the payment of the claims of the decedent's non-resident creditors"; (c) that the jurisdiction of the New York Surrogate's Court "does not depend upon the presence or absence of creditors in New York"; and (d) that Judge Cardozo's opinion, in *In re Martin's Will,* 255 N. Y. 359, does not hold that "the policy of the New York courts is opposed to useless and wasteful duplication of administrations."

We reply to these propositions in a few words as follows:

A. The cases cited for the proposition that the New York Surrogate's Court can distribute an ancillary estate directly to beneficiaries without transmission to the domiciliary administrator, cited on page 28 of respondent's brief, *do not support this proposition except where all the legatees or other distributees are in New York,* which is not the situation in this estate since it is alleged that the decedent left distributees and possible heirs in France, Brazil and Morocco (R. 37).

The New York courts have repeatedly held, as we show on page 19 of our petition, that it is only (1) where all of the next of kin reside in New York and (2) where the rule of distribution in New York is identical with the rule of distribution in the domiciliary administration, that distribution will be permitted in New York (see cases cited, page 19 of our petition). Both of these requirements are negatived by the sworn allegations of the complaint in this case directly to the contrary (R. 5, 8).

B. Respondent's argument that the New York Surrogate's Court has complete power to direct the payment of the claims of the decedent's non-resident creditors is both irrelevant and unsupported by the cases cited (p. 29) in respondent's brief. In the *Van Bokkelen's Estate* case, the New York Surrogate's Court permitted a New York ancillary administrator to pay a *preferred New York creditor* of an insolvent estate in full; and in the *Hopper* case the Court of Appeals of New York held that the New York Surrogate could pay a non-resident creditor *provided the cause of action arose in New York State.* Neither of these situations exists in the case at bar; and in many other decisions the New York Surrogates have flatly

refused to pay non-resident creditors. For example, *In re Meyer's Estate,* 211 N. Y. S. 525, aff'd in 244 N. Y. 598, held that an Illinois creditor was properly denied the right to file his claim in an ancillary estate in the New York Surrogate's Court, but would have to go to the domiciliary administration *in Australia* for collection. In this case Surrogate Foley said (p. 528):

> "The purpose of ancillary administration and the distribution of assets here (in New York) is *primarily for the protection of New York creditors* and *New York beneficiaries* of an estate."

C. Petitioner cited in his brief (p. 18) five cases in the Supreme Courts of five different states (including New York) holding that *no ancillary administration is proper* in any state *in the absence of local creditors* in that state. Not only does the complaint herein squarely allege that *there were no New York creditors to justify a New York ancillary administration in this case,* but also that there were no inheritance, succession or other taxes due in New York upon these assets (R. 7-9).

On this crucial subject all that respondent has to say is contained in the single sentence following:

> "It is notable that of five cases cited by petitioner on this point only one is a New York case and this does not support him (Petitioner's Brief, 18)."

This is strictly inaccurate. Not only do *each of the decisions in the Supreme Courts of Minnesota, New Jersey, Wisconsin and Illinois* support the proposition that *in the absence of local creditors no ancillary administration is proper,* but also the New York case of *In re Meyer's Estate,* 211 N. Y. S. 525; aff'd in 244 N. Y. 598, as shown above, holds that "the purpose of ancillary administration and the distribution of the assets here (in New York)

is *primarily for the protection of New York creditors* and *New York beneficiaries* of an estate."

In other words, *the unquestioned rule of law* governing the administration of all decedents' estates in the United States is that *in the absence of local creditors there shall be no useless and expensive local ancillary administrations.* It is precisely *to compel such a useless and expensive local ancillary administration in New York* that respondent here, which is a mere bank custodian of the decedent's securities here involved, is resisting the entry of an *in personam* order which is admittedly within the Federal Court's jurisdiction in Illinois in this case, and which would completely protect it from any liability in the future in any other proceeding.

D. Finally the respondent's statement that Judge Cardozo did not in his opinion in *In re Martin's Will,* 255 N. Y. 359, decide, as petitioner contends, that a useless and expensive ancillary double administration should be avoided, is incorrect. On page 31 of its brief respondent quotes from Judge Cardozo's opinion the very language in which he cited with approval the case of *State of Colorado* v. *Harbeck,* 232 N. Y. 71, and held that New York would refuse to remit the local assets to a foreign state "since compliance with the demand *would result in a depletion of the assets by the unnecessary expenses of a double administration,*" especially where the local ancillary administration had "conveyed repeated offers to the taxing officers in Connecticut (the foreign state) to make payment of any tax found owing" there, exactly as petitioner has offered in this case to pay any succession taxes due in New York (R. 7-8). Judge Cardozo then continued: "What he (the New York ancillary administrator) refused was *a wasteful duplication of administrations and accountings.*"

If this is not a strong decision that *a useless and wasteful duplication of administrations should be avoided under such circumstances as are alleged in this case,* then we do not understand Judge Cardozo's clear language to that effect which he twice repeated.

Conclusion

Petitioner urges that there is nothing in respondent's brief which shows any want of authority in the Federal Court in Illinois to enter a valid order or decree *in personam* requiring respondent either to turn over the securities sued for or to pay a money judgment for their monetary value. Nor does the respondent show that the unchallenged rule of law established in the New England *Life Insurance Co.* and *Equitable Life Assurance Society* cases, consistently followed by the Circuit Courts of Appeals for half a century until the decision in this case, should not be applied here to prevent a useless and expensive ancillary administration in New York which would serve no conceivable purpose, there being no New York creditors and the New York Surrogate's Court having no power over these assets except to transmit them for final administration to some as yet undetermined court outside the United States of America where Illinois creditors would need to follow.

For this reason petitioner submits that the petition for a writ of certiorari should be allowed.

Respectfully submitted,

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Norman Crawford,
Of Counsel.